

OGC HAS REVIEWED.

CHAPTER

YOUR CONTINUING OBLIGATIONS

When writing under this heading there are two approaches which are equally valid, but perhaps not equally compelling. One is to point out the positive reasons for holding secret, matter learned in the course of your employment, namely, the dual protection afforded yourself and the pending and future operations of the agency which you have faithfully served; the other is to make it abundantly clear that the recent interpretation given the Espionage Act by the Supreme Court of the United States, has put teeth in that Act which will bite and hold, not only the notoriously disloyal, but also those who know their obligations, yet for reasons of personal pride or gain, fail to live up to them.

When you entered on your work for this organization, you *probably* swore under oath that you would not disclose or reveal either by word or by conduct any information which you might obtain by reason of your employment by the Office of Strategic Services, and that you would forever keep secret any information so obtained by you.

This oath attached solemnity to a pre-existing obligation. It reminded you, with great deliberateness, of the serious penalties which could be invoked against you if you failed to safeguard properly the information to which you had access and with which you were entrusted. Without the oath you were bound by the law of the land; with the oath, you placed an additional prop under these obligations imposed by law - you pledged your honor and integrity to the support of the law as a sanction over and above the fear of criminal prosecution.

When you volunteered your services with this organization, you were not accepted until a thorough investigation of your loyalty had been completed. The fact that you did work as a member of OSS is a tribute to your loyalty. You were not found wanting in this essential quality during employment. It is the purpose of this chapter to point out, with utmost clarity, your future obligations, so that you will not, even inadvertently, be found wanting after your employment has been faithfully terminated.

There are those who will cry "Censorship" and a few who will add "Censorship be damned", but the cold fact remains there are things you cannot talk or write about. And you cannot talk or write about some things because the law clearly states you cannot. The prohibited topics are few and limited; they are of a military nature; they relate to the national defense which the Supreme Court has held to be a "generic concept of broad connotations referring to the military and naval establishments and the related activities of national preparedness"; they are forbidden until specific written authority has authorized disclosure or, as the Supreme Court pointed out, until reports on these matters are published with the authority of Congress or the military establishments; the prohibition may last forever and does not automatically terminate with the cessation of hostilities.

*Prin* What these forbidden topics are has been clearly stated by the Government in the recent case of Gorin v. U.S. in the following words:

"In short, the phrase 'information connected with the National Defense' as used in the context of the

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Espionage Act, means, broadly, secret or confidential information which has its primary significance in relation to the possible armed conflicts in which the nation might be engaged. The protected information is readily recognizable from the common experience and knowledge of the average man."

The quoted passage states precisely, the need for continued secrecy. Although all men devoutly hope this war will be the last, it is a hope without guarantee of fulfillment. The Supreme Court recognized the fact that allies may become enemies with the passage of time; and that the Congress foresaw this potentiality when it forbade disclosure, in time of war or peace, of information related to national defense which could be used to the advantage of any foreign government. The Supreme Court has said that <sup>one</sup> such an advantage <sup>embraced</sup> was anything that would allow a foreign Government to check on the efficiency of our methods of warfare. Now this is precisely the information which you must safeguard as long as disclosure has not been authorized. OSS has developed techniques of warfare, physical, psychological, logistic, etc., the value of which has been amply established. You have been responsible for developing or executing some of these methods. Your responsibility continues, to safeguard these military advantages for the future of your country. What the enemy does not know, can hurt him—now, a year from now, ten or

The final thing to do is to spell out for you exactly what the Espionage Act says you cannot do. This Act by its very name seems not to have the remotest connection with you. You associate with it, Jap admirals, disguised as ignorant fishermen or Nazi officers in the guise of singing waiters. But it does mean you, as you will see. Perhaps the language does not at first appear quite clear. Not as clear, for instance, as the language of the English and Canadian statutes and regulations which impose heavy fines and imprisonment on any person who discloses non-disclosable information, "without lawful authority to publish the contents of any confidential document belonging to or any confidential information obtained from any governmental department or any person in the service of His Majesty." Our language is not so direct, perhaps, as the language of the English Official Secrets Act of 1911, which operates in peace-time as well as war-time and which heavily punishes anyone who communicates to any unauthorized person any information intrusted in confidence to him or obtained, or to which a person has had access during an official assignment.

But the language of our statute is ultimately just as effective, although it clearly safeguards against surprised innocence and the forced restraint of innocent acts for fear of the reach of an indefinite statute. As one member of the Supreme Court said,

"On no construction can the statutory provisions /Espionage Act/ here involved become a trap for those who act in good faith."

Here is a summary of the Espionage Act as interpreted by the highest court in the land and as it applies to you:

1. The constitutional provisions protecting freedom of speech and press are not violated by the Act.

2. The language of the Act is not vague - a person can readily predetermine whether a contemplated act is criminal.

3. The federal statute [Espionage Act] does not preclude the right of a state to legislate on the subject. Violations of the Act, therefore, might bring additional penalties under a State Act.

4. It is enough if a person does an unauthorized act which might conceivably be of advantage to any foreign government. This is enough without the presence of possible injury to the United States. There does not have to be an actual advantage to a foreign Government or an actual injury to the United States.

5. It is not for the individual to make the judgment "Now it can be told." It is immaterial how innocuous is the information contained in the unauthorized disclosure. Guilt can exist even where the value of the information is worth less than the price of a phone call made to discuss it.

6. The Act does not become inoperative on the termination of hostilities.

7. Violations of the Act are not limited to the specific places set out in § 31 of Title 50, U. S. C.

8. Serious collateral consequences attach to violation of the act, as deportation in the case of an alien, or disbarment in the case of an attorney.

9. A person, to violate the act, must intend or have reason to believe that the information he reveals may be used to the advantage of any foreign Government (even a friendly nation) or

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to the injury of the U. S. The fact that an authorized person directs and determines that certain information shall not be divulged has been held admissible as evidence to establish "reason to believe". You are reminded now that such a determination has been made. Motive is different from intent. The motive may be to magnify one's ego by revealing the importance of the trust reposed in one or to sell at a profit to a publisher, unique information, or it may be actually traitorous, but regardless of motive, intent is determinative of guilt, and it is established that when a man deliberately does something (as revealing information which his training or instruction have indicated is non-disclosable until specifically authorized) he is held to intend the natural and probably consequences of his words. This intent can be present even when the motives are above reproach.

10. It is for a Jury to decide as a question of fact whether or not the information revealed is related to the national defense and the courts have held that the requirement of secrecy in the public interest and for the national defense even in time of peace, is established in the exercise of a sound discretion by the Executive Branch of the Government and no jury could lightly ignore, according to the courts, a certification by the Secretary of the Navy or the Secretary of War that a disclosure is against the national interest. This certification has been made regarding secret and confidential matters learned in the course of <sup>your</sup> employment and it continues until the same authority which created the classification, directly or indirectly,

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removes the limitation attaching to the discussion or publication of such matters. The manner in which material is de-classified and released for publication appears elsewhere. (At page ).

It may help, finally, to state the law by way of the following hypothetical example:

*Change name to (Mr. R. V. Loyell)* Mr. I. Q. W<sup>y</sup>nde has done his work well for OSS and is eligible for return to civilian employment. He has learned many interesting things in the course of his employment, which would serve to illustrate the calibre and importance of his work, the courage and ingenuity of his associates, the efficiency and unique contributions his agency has made to the war effort. Mr. Elwood of Elwood, Elwood and Elwood, Publishers, also has learned what Mr. W<sup>y</sup>nde has learned and suggests that a conference might prove profitable to both parties. At the conference, Mr. Elwood bravely asserts that the press admits no muzzle and even quotes the late Mr. Justice Brandeis to the effect that only an emergency can justify repressions and such must be the rule, if authority is to be reconciled with freedom. He suggests that since Mr. W<sup>y</sup>nde has his own personal notes, no one can take them from him and he might as well put them to use. He further suggests a gratuitous talk before a book club which might well lead to a contract to write a book, and would Mr. Wun<sup>k</sup>e be interested. Mr. Wun<sup>k</sup>e is interested, and there is no crime in this. Mr. Wun<sup>k</sup>e, moreover, agrees to the proposal, and here the trouble begins. The discussion before the club will be limited to intelligence activities, with which Mr. Wun<sup>k</sup>e modestly admits he was vitally and intimately connected. The night before the discussion, Mr. Wun<sup>k</sup>e really reads the Espionage Act for the first time and he

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whittles it down until he sees himself within the terms of the statute. The Espionage Act (50 U. S. C. 31) reads for him like this:

"(A) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation-----; (b)-----copies, takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make or obtain, any sketch, photograph,-----map, model,-----document, writing, or note of anything connected with the national defense; or (c) whoever, for the purpose aforesaid, receives or obtains---any document, writing----, sketch, photograph----, map, model-----or note, of anything connected with the national defense, knowing or having reason to believe----that it has been or will be obtained----or disposed of by any person contrary to the provisions of this title; or (d) whoever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, code book, signal book, sketch, photograph, ----- map, model,-----or note relating to the national defense willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it,-



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shall be punished by imprisonment for not more than ten years and may, in the discretion of the court, be fined not more than \$10,000."

Mr. Loyell is really thinking now. The very mention of disloyalty is abhorrent to him. Mr. Elwood, however, certainly did not think his proposal was disloyal. But then any fool can see even Mr. Elwood comes under the statute. That business about handing on to his personal notes makes very little sense now. They are not his notes after all. Whether he reveals his information, before obtaining prior clearance, with or without remuneration, has nothing to do with the case.

Mr. Loyell recalls now having heard something similar to what has been written in this chapter. He knows that he has been told that he cannot reveal confidential information learned in the course of employment and that this will prove "reason to believe" under the statute. He knows all the other things too -- what "advantage to any foreign government" really means and what "related to the national defense" really means. We leave ~~the rest to the reader.~~

The above example is only one instance of how the Espionage Act can be violated. We choose that illustration because it should warn the innocent and the loyal of their obligations. The treacherous we feel do not merit such a warning.